88-821

No. ———

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

———

STATE OF VERMONT,

Petitioner,

v.

DAVID P. BRUNELL,

Respondent.

———

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

———

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QUESTION PRESENTED

The Vermont Supreme Court held that, because a police officer merely conveys a sense of urgency in conducting a prompt murder investigation and then follows the standard police practice of separating suspects for interviews, these factors constituted a significant deprivation of respondent's freedom despite the fact that the respondent received repeated instructions that he was not under arrest and could refrain from answering questions.

The question presented is: Does one entreaty to a respondent by a police officer to provide timely assistance in a murder investigation, coupled with a refusal to permit family members to accompany the respondent to the stationhouse, result in "custody" when the suspect is repeatedly told and understands he is free to leave, he is not under arrest, and he does not have to answer questions?

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OPINION BELOW

The opinion of the Supreme Court of Vermont is reported at 149 Vt. ——; it also appears at —— A.2d —— (1988). The opinion is reprinted in Appendix A.

JURISDICTION

The Supreme Court of Vermont issued its decision on September 16, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision invoked in this cause, the Fifth Amendment to the United States Constitution, provides, in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

STATEMENT OF THE CASE

After receiving autopsy results establishing that a young child had been the victim of a homicide caused by suffocation and severe shaking, the police tried to interview the parents of the deceased girl in order to learn about the circumstances surrounding her death. At that point the police lacked probable cause to arrest, Pet. App. 45a; the criminal investigation was compelled by the medical examiner's suspicions of child abuse and by an earlier, unresolved determination of abuse.

Law enforcement officers located the parents who had gone to the home of the deceased's paternal grandparents who resided in another county. Three plain clothes officers arrived there shortly after 10:00 p.m. and spoke with the parents in front of other relatives.[1] The conversation was low-key. Two of the officers were acquainted with the family; condolences were expressed. Then one officer asked the parents "if they would be willing to accompany us to the State Police Barracks, and I assured them that they would be returned to their residence as fast as we could get there, take their statements, and get home." Pet. App. 46a. It was explained that the respondent and his wife could decide whether or not to accompany the police. The police "wanted to clear the matter up, and because they were the victim's parents, and because David and his wife were the last ones to be with the victim. And we simply left it up to them whether or not they wanted to accompany us." Pet. App. 46a. Both parents chose to go with the officers.

Upon arrival at the police barracks, respondent was separated from his wife and interviewed by two of the plain clothes officers in a room normally used as a private office. Pet. App. 47a. The testimony was uncontroverted

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[1] Involvement of one of the officers was limited to assisting the other two in locating the grandparents' house; he played no part in the conversations at the house or the police barracks.

that "David was told that he was free not to talk to us and that he was free to leave at any time. And I further advised him that we would give himself and his wife a ride home at any time that they requested and that they could terminate the questioning at any time. He was also advised that he was not under arrest." Pet. App. 48a. Respondent indicated that he understood his choices and agreed to participate in the interview, with the knowledge that the return to the family homestead was not premised on supplying answers to any questions. As respondent himself expressed in his statement to the police, "You ain't made no threats but you said you'd promise that you'd take me home." Pet. App. 59a. During the course of the interview, no weapons or handcuffs were shown or used by the police. Respondent's freedom of movement was in no way curtailed; at times he was left alone in the office.

The police did not administer *Miranda* warnings. Instead the interrogation session, which lasted approximately one hour and twenty minutes, commenced following the explanation that respondent was free to leave and could choose not to answer questions. The police were still trying to establish "who was or who would have been responsible, and who was with her and so forth." Pet. App. 49a. Some portion of the interview session centered on the events preceding the night of the girl's death. Pet. App. 31a. As a result of a remark that the death was possibly accidental, respondent stated that it had been an accident; then he confessed to shaking and smothering his daughter.

Respondent gave a statement in which he indicated that his presence at the police barracks was voluntary, that he knew he was free to leave and that he had not been subjected to threats or promises other than the promise that he would be driven home. Pet. App. 33a.

Below, respondent had filed a pre-trial motion to suppress alleging that, since the interview had been custodial,

the police had erred when they failed to administer the requisite *Miranda* warnings. The trial court determined that the respondent had been in custody throughout the interrogation session at the police barracks. The court purportedly used a totality of the circumstances test and found that the defendant was "deprived of his freedom of action in a significant way." Pet. App. 35a. The basis of this determination was the following:

1. a single remark that the respondent and his wife "had" to go to the police barracks for the interview,
2. the time and location of the interview, and
3. the progressive isolation from family and familiar surroundings. Pet. App. 35a-37a.

Four members of the state Supreme Court concurred with the findings and conclusions of the lower court and affirmed, holding that, as a matter of law, a reasonable person would not believe that he was free to refuse to go to the barracks and answer police questioning that evening. Pet. App. 8a.[2] Justice Peck filed a strong dissent which lauded the police for their good investigatory procedure. Pet. App. 13a. The dissent commended the swift police efforts aimed at seeking fresh information unblemished by a concocted false alibi or fictitious account. The dissent cited the multitude of occasions, both before and after the remark to respondent's mother and at the barracks, when the police informed respondent he was not under arrest and was free to terminate the interview at will. Respondent's movements were not restricted until late the following morning after he had been returned to the family homestead and had thereafter driven back to his own community to make funeral arangements.

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[2] The Vermont Supreme Court's decision was premised entirely on its interpretation of federal constitutional law; there was no reliance on independent state constitutional grounds. Pet. App. 6a.

The dissent also faulted the majority for its reliance on the location of the interview. "There is nothing to indicate that their original agreement, to accompany the police voluntarily, changed in any way because of the facilities to which they were to be taken." Pet. App. 22a. Justice Peck rejected the isolation from family argument, noting that "it is logical and entirely proper procedure for investigating officers to separate possible suspects and potential witnesses." Pet. App. 23a. The dissent saw the erroneous decision as a serious impediment to legitimate criminal investigative efforts by law enforcement officers.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The Court is strongly urged to grant the petition in order to clarify the meaning of custody for lower courts and law enforcement personnel. The variety of factors and approaches employed by the courts in their custody determinations requires that the Court provide a calculable and uniform means of determining "when a person has been taken into custody or otherwise deprived of his freedom in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Since lower courts have displayed confusion in their use of this test, additional guidance is called for in order to assist the courts in their decision-making and to aid police officers and prosecutors in their investigations. A strong presumption against a finding of custody is called for in situations characterized by explicit statements informing an individual, who at that stage in the investigation may be either a potential witness or suspect, that he is not under arrest and is free to refrain from answering questions. Likewise, the practice of separating possible witnesses should not be penalized by ill-conceived judicial opinions.

I. The Decision Of The Vermont Supreme Court Erroneously Interpreted Decisions Of The United States Supreme Court.

Despite two per curiam decisions from this Court regarding lack of custody created by a suspect's voluntary presence at a stationhouse interrogation, *Oregon v. Mathiason*, 429 U.S. 492 (1977), and *California v. Beheler*, 463 U.S. 1121 (1982), the Vermont Supreme Court has erroneously applied *Miranda* to a situation involving no restraint on a suspect's freedom of movement. By affirming the decision of the trial court, the state high court "read *Miranda* too broadly." *Oregon v. Mathiason*, 429 U.S. at 493. The state courts ignored this Court's common sense assessment that, although a stationhouse interview will have coercive aspects, *Miranda* warnings are not required in every case. Similarly the Vermont decision recognized but failed to apply "the ultimate inquiry . . . (of) whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. at 1125 (quoting *Oregon v. Mathiason*, 429 U.S. at 495). The state high court simply rubber stamped an invalid trial court conclusion that singled out a police officer's request for timely cooperation. By overemphasizing this entreaty and ignoring the realities of police investigative work, the trial court misread federal precedent, *i.e.*, *Miranda* warnings are not required when a "suspect is not placed under arrest, voluntarily comes to the police station, and is allowed to leave unhindered by police after a brief interview." *California v. Beheler*, 463 U.S. at 1121.

The crux of the erroneous decision turns on one officer's answer to a question from respondent's mother that he had to go to the police barracks while the information remained fresh in his mind.[3] There is nothing on the record to show that this remark negated the numerous

[3] The record does not demonstrate how the respondent reacted to this remark made to his mother.

other explicit remarks from both officers that the dead child's parents would not be under arrest and could terminate the interview or refuse to answer questions as they wished. Moreover, under these circumstances the "had to go" language is far less coercive than the situation in *Minnesota v. Murphy*, 465 U.S. 420, 427 (1984), where a probationer who had an obligation to attend meetings with the probation officer and answer questions truthfully was not in custody for purposes of administering *Miranda* warnings. See, too, *United States v. Baird*, 851 F.2d 376, 380 (D.C. Cir. 1988) (order from military superior to officer to attend an interview does not render session with criminal investigator custodial).

In summary, the Vermont decision was erroneous. The conclusions of the lower court were wrong as a matter of law. This error was perpetuated when the Vermont Supreme Court affirmed the lower court. The uncontradicted remarks of the officers at the barracks plainly indicated to respondent that he was free to leave or to choose which questions to answer. A determination of custody on these facts ignores the very reason for the creation of prophylactic measures and stretches *Miranda* far beyond its intended limits.

II. Confusion And Lack Of Uniformity Among The Federal Circuit And State Courts Demonstrates The Need For More Specific Guidance In The Area Of Custody Determinations.

The confusion and lack of uniformity among the federal circuit and state courts has undone the Court's promise that "*Miranda*'s holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible." *Fare v. Michael C.*, 442 U.S. 707, 718 (1979). The Court needs to correct the decision from the Vermont

Supreme Court and provide other courts and law enforcement personnel with more precise instructions to aid them in arriving at custody determinations.

At present the courts apply a variety of approaches in deciding *Miranda*-related suppression issues. Some courts employ a reasonable man approach. In *United States v. Bengivenga*, 845 F.2d 593 (5th Cir. 1988), the Fifth Circuit recently abandoned a practice of case-by-case review using a four factor test[4] in favor of analysis under a reasonable man approach. A suspect is in custody when placed under formal arrest or when a reasonable person in the suspect's position believes his freedom of movement is restrained. The Third Circuit also looks to the degree of restraint on the subject's freedom, *Patterson v. Cuyler*, 729 F.2d 925, 929 (3rd Cir. 1984) (cert. denied 107 S.Ct. 119 (1986), as does the Eleventh Circuit. *United States v. Phillips*, 812 F.2d 1355, 1359-1362 (11th Cir. 1987) (there the court did consider relevant the fact that the respondent was not placed under arrest). However, a different panel in the Eleventh Circuit applied the four factors previously rejected in *Phillips*. In *Davis v. Kemp*, 829 F.2d 1522, 1535 (11th Cir. 1987), the court determined that the defendant was not in custody since there was no indication that he was a suspect and he was not the focus of the investigation, i.e., he was considered a prospective witness. The decision noted that the police lacked probable cause to arrest him and also observed that he had voluntarily gone to the station for one of the interviews. Thus this circuit has adopted inconsistent approaches in determining questions involving custody.

The Tenth Circuit utilizes an approach similar to the one used in *Bengivenga*. In *United States v. Chalan*, 812

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[4] Whether there was probable cause to arrest defendant, whether the investigation had focused on defendant, whether the police had a subjective intent to hold defendant, and whether the defendant had a subjective belief he was not free to go.

F.2d 1302 (10th Cir. 1987), the standard was clearly stated. "To measure the degree of restraint on the freedom of a suspect's movement, a court must examine 'how a reasonable man in the suspect's position would have understood his situation.'" *Id.* at 1306 (quoting *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984). The analysis specifically rejected focus as an appropriate factor. The court noted the absence of force and the specific statement from the police that the respondent was not being charged with a crime. An additional factor was respondent's voluntary presence at the interview. Even if his attendance at the interview was attributable to pressure from Indian custom, i.e., a "had to go" situation, it did not override his freedom of movement.

While the Ninth Circuit employs an objective standard, it is characterized by several specific factors which include the language used to summon the suspect, the physical surroundings at the interrogation, the extent to which the accused is confronted with evidence of his guilt, the amount of pressure exerted, and the duration of the detention. *United States v. Beraun-Panez*, 812 F.2d 578 (9th Cir. 1987).

A decision from the First Circuit illustrates a slightly different approach relying on "whether the suspect was questioned in familiar or at least neutral surroundings, the number of law enforcement officers present at the scene, the degree of physical restraint placed upon the suspect, and the duration and character of the interrogation." *United States v. Masse*, 816 F.2d 805, 809 (1st Cir. 1987) (quoting *United States v. Streifel*, 781 F.2d 953, 961 n.13 (1st Cir. 1986).

Other circuits continue to employ a more subjective approach. The Fourth Circuit appears to favor a totality of the circumstances approach with earlier cases serving as models of comparison. Thus, similarities with *Beheler* and *Mathiason* are noteworthy. In *United States v. Jones*,

818 F. 2d 1119, 1125 (4th Cir. 1987), the court found significant the specific advice from a law enforcement officer that the suspect was not under arrest. The fact that respondent was given a ride to the police station by law enforcement agents was considered constitutionally irrelevant. Reliance was placed on respondent's perception of the interview and the treatment she received from the police.

Subjective belief of the respondent was dispositive in *United States v. Helmel*, 769 F.2d 1306 (8th Cir. 1985). There it was highly "significant that (respondent) was specifically informed by the agents that he was not under arrest." *Id.* at 1320. The decision emphasized that the purpose, place and length of the interrogation along with the explicit assurance that respondent could leave were factors to be considered.

State courts generally look to the explicit statements of the police and to the character of the interview. Some cases indicate adoption of a reasonable man test. See, *State v. Allen*, 367 S.E.2d 626 (N.C. 1988) (explicit rejection of subjective criteria, emphasis on statement that suspect was told she was free to go); *State v. Caruolo*, 524 A.2d 575 (R.I. 1987) (voluntary presence at interviews where purpose was to obtain general information). Decisions vary from state to state with individual emphasis on a range of factors, which at times are specifically noted. See, for example, *Farrell v. State*, 523 So.2d 562 (Fla. 1988) (request to go to police station to aid in investigation plus individual's unimpeded departure made interview non-custodial); *People v. Langlo*, 505 N.E.2d 1338, 1341, 153 Ill. App. 3d 636, —— (1987), rehearing denied (1987) (relevant criteria include site of interview, any police statements or nonverbal conduct indicating accused is not free to leave, focus, intentions of police officers, and objective circumstances surrounding investigation); *State v. Norberg*, 423 N.W.2d 733 (Minn. App. 1988) (since respondent was told he was free to leave and need

not answer questions, interview by two plainclothes officers was non-custodial); *Zook v. State*, 513 N.E.2d 1217, 1220-21 (Ind. 1987) (police department interview was not custodial where respondent was told he was not under arrest; no basis on which to find coercive custodial interrogation in absence of numerous uniformed officers or display of weapons).

A similar mode of analysis to *United States v. Masse*, supra, was utilized in *Finch v. State*, 518 So.2d 864 (1987), rehearing denied, cert. denied (1988) (in addition to First Circuit test, the court considered how suspect got to the interrogation site; criteria mentioned were the factors used by the Ninth Circuit in *Beraun-Panez*). See, also, *People v. Milhollin*, 751 P.2d 43, 49-50 (Colo. 1988) ("Relevant criteria include the time, place, and purpose of the encounter, the words and demeanor of the officer, and the person's verbal or non-verbal response to any directions given to him by the officer.")

The variety of factors and approaches employed by the courts have created an absence of uniformity in judicial decision-making. This Court must express its view on how custody determinations are to be made. Law enforcement officers are presently uncertain about how to proceed in investigations. Lower courts need clarification in order to help them avoid making error.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court grant the petition for a Writ of Certiorari to review the decision of the Vermont Supreme Court. Alternatively, petitioner urges the Court to take summary action by granting the petition and reversing the judgment of the Vermont Supreme Court on the grounds that it is squarely inconsistent with this Court's decisions in *California v. Beheler* and *Oregon v. Mathiason.*

Respectfully submitted,

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Dated: November 14, 1988

APPENDIX

APPENDIX

VERMONT SUPREME COURT

Supreme Court Docket No. 86-468
June Term, 1987

STATE OF VERMONT

v.

DAVID P. BRUNELL

[Filed Sept. 16, 1988]

Appealed from District Court of Vermont
Unit No. 2, Chittenden Circuit

Docket No. 656-6-86WnCr

ENTRY ORDER

In the above entitled cause the Clerk will enter: *Affirmed.*

Dissenting:

/s/ Louis P. Peck
LOUIS P. PECK
Associate Justice

FOR THE COURT:

/s/ Frederic W. Allen
FREDERIC W. ALLEN
Chief Justice
Concurring:

/s/ Ernest W. Gibson III
ERNEST W. GIBSON III
Associate Justice

/s/ John A. Dooley
JOHN A. DOOLEY
Associate Judge

/s/ Albert W. Barney
ALBERT W. BARNEY
Chief Justice (Ret.)
Specially Assigned

VERMONT SUPREME COURT
June Term, 1987

No. 86-468

STATE OF VERMONT

v.

DAVID P. BRUNELL

[Filed Sept. 16, 1988]

On Appeal from District Court of Vermont
Unit No. 2, Chittenden Circuit

Linda Levitt, J.

Jeffrey L. Amestoy, Attorney General, and Susan B. Harritt, Assistant Attorney General, Montpelier, for plaintiff-appellant

Kimberly B. Cheney, Robert Sheil, and Ken Messing and Karen Golden, Law Clerks (On the Brief), Montpelier, for defendant-appellee

Present: Allen, C.J., Peck, Gibson and Dooley, JJ., and Barney, C.J. (Ret.), Specially Assigned

ALLEN, C.J. The State appeals, pursuant to 13 V.S.A. § 7403(c)(1) and (2) and V.R.A.P. 5(b)(1)(A) and (B), the grant of a motion to suppress statements made to police officers by the defendant following interrogation

at police barracks. Defendant is charged with murder in the first degree. 13 V.S.A. § 2301. We affirm.

The unchallenged findings of fact indicate that a state police officer received a call from the Medical Examiner's office advising that a female child had been pronounced dead on arrival at a hospital and that a brief examination revealed signs of physical abuse. The state police officer notified the chief of police of the town where the victim and her parents resided and the two officers then attended the autopsy of the victim. At the conclusion of the autopsy, they were informed by the physician performing it that the death was a homicide caused by suffocation and severe shaking.

The police officers, based on earlier abuse allegations, suspected that either the defendant or his wife was responsible for the death. They were also aware that the victim had been removed from the home by the Department of Social and Rehabilitation Services, and only recently returned to it.

After learning of the whereabouts of defendant, the officers met with the state's attorney to discuss the investigation. It was agreed at this meeting that they would not take defendant and his wife into custody "so that defendant and his wife could be questioned without being first informed of their *Miranda* rights."

The officers, along with a third state police officer who could assist in locating the home of the parents of defendant where defendant and his wife were visiting, arrived at the parents' home shortly after 10:00 p.m. Present at the parents' home were several of defendant's siblings and their spouses, as well as defendant and his wife.

The officers informed defendant and his wife that the officers were required to investigate the child's death and asked them to go to the police station to speak with them

about the child's death. One of the state police officers told defendant and his wife that they did not have to come to the police station, but that if they did come he would bring them back home after the interview. Defendant's mother then inquired as to whether they had to go that night. The chief of police answered that they did because he wanted the statement while the events were still fresh in their minds. Defendant's brother requested permission to accompany defendant to the interrogation, but this request was refused. Defendant and his wife then agreed to go. They were taken by police cruiser to the state police barracks, located about a half-hour drive from the parents' home.

Upon arrival at the barracks, they were immediately separated. A state police officer and the chief placed the defendant in a small office, where they began their interrogation at about 10:40 p.m. Defendant was informed at the outset that he was not under arrest or in custody, that he did not have to talk, and that they would give him a ride home when he wanted. Defendant agreed to be interviewed, and at no time indicated his unwillingness to speak with them.

During the course of this interview, and before any *Miranda* warnings were given, defendant, in response to a suggestion by the chief that the death was "accidental," stated that "it was an accident," and inquired as to whether he was going to jail that night. After being informed that he was not going to jail that night, he made additional incriminating statements. After making these statements, he was read his *Miranda* rights, acknowledged that he understood them, and signed a written waiver of those rights. This took place shortly after midnight. The officers then took a taped statement from defendant, in which he reiterated his earlier statements. At the start of the taped interview, he acknowledged that his presence at the barracks was voluntary, that he knew he was free to leave, and that he had not been sub-

jected to threats or promises, other than the promise that he would be driven home. He was then driven home, leaving the barracks at 12:47 a.m.

Defendant sought to suppress all of the statements made during his interrogation at the barracks, on the grounds that they were taken in violation of his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Chapter I, Article 10 of the Vermont Constitution. He contended that he was in custody during the interrogation, and that because the initial portion of the interrogation was not preceded by *Miranda* warnings, the initial statements must be suppressed. He further contended that the subsequent taped statement must also be suppressed because the later warnings were not sufficient to "purge the taint of the initial illegal interrogation."

The trial court concluded that the statements obtained from the defendant had to be suppressed because the defendant was "in custody" within the meaning of *Miranda v. Arizona*, 384 U.S. 436 (1966). We affirm.*

In our review, we must be guided by certain fundamental principles, the first and foremost being that the trial court's ruling will not be disturbed unless it was clearly erroneous. *State v. Harvey*, 145 Vt. 654, 657, 497 A.2d 356, 357 (1985). The State had the burden to establish by a preponderance of the evidence that the confession was voluntary, *Lego v. Twomey*, 404 U.S. 477, 489 (1972), and that the defendant knowingly and intelligently waived his Fifth Amendment rights. *State v. Clark*, 143 Vt. 11, 12, 460 A.2d 449, 450 (1983). Here, the trial court properly focused on this Court's statement in *State v. Willis*, 145 Vt. 459, 494 A.2d 108 (1985), that:

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* The trial court's analysis was based only on the United States Constitution. On appeal, neither the State nor defendant raises issues pertaining to the Vermont Constitution.

> [I]n determining when a suspect "has been taken into custody or otherwise deprived of his freedom of action in any significant way," our courts should make an objective inquiry into the totality of the circumstances to determine if a reasonable person would believe he or she were free to leave or to refuse to answer police questioning.

Id. at 475, 494 A.2d at 117 (citation omitted). The trial court concluded that a reasonable person in defendant's shoes under the existing circumstances would not have felt free to leave or to refuse to submit to questioning.

The State argues that the legal conclusion drawn from the facts found by the court is erroneous as a matter of law. It contends that the outcome under the Fifth Amendment is dictated by the per curiam holdings of the United States Supreme Court in *Oregon v. Mathiason*, 429 U.S. 492 (1977) and *California v. Beheler*, 463 U.S. 1121 (1983). In *Mathiason*, a police officer, after attempting to contact the defendant for three or four days without success, left a card at defendant's apartment asking defendant to call. The defendant did call and was asked when it would be convenient to meet. The defendant had no preference so the officer asked if the defendant could meet at the state police office at about 5:00 p.m. This office was about two blocks from the defendant's apartment. They did meet, shook hands, and the defendant was told that he was not under arrest. The interview was over in a half an hour and the defendant left. In summarily reversing the grant of the suppression motion, the United States Supreme Court stressed the defendant's voluntary arrival at the police station, the brief stay, and the casual nature of the entire action. *Mathiason*, 429 U.S. at 494-96. In *Beheler*, the Court held that the defendant had not been in custody during an interview with police and therefore was not entitled to *Miranda* warnings. The Court based its conclusion on the facts that the defendant accompanied

the police to the station house, he was informed that he was not under arrest, the interview lasted less than thirty minutes, and the defendant was permitted to leave. *Beheler*, 463 U.S. at 1122-25.

While these cases have factual similarities to this case, the differences justify a different result. Here, defendant was requested to go to the station, was told that he did not have to go, that he would be brought back after the interview, and agreed to go—but only after his mother had been informed in his presence that he "had" to go that night. While the statements made by the officers may have been contradictory and confusing, it cannot be said on these factual findings that the trial court was wrong, as a matter of law, in concluding that a reasonable person would not believe that he was free to refuse to go to the barracks and answer police questioning that evening. The continued assertions by the officers that he was not under arrest or in custody, pursuant to their plan to avoid having to give *Miranda* warnings, cannot overcome the restriction placed upon defendant's freedom by the statement that he "had" to go that night, the thirty minute ride in the cruiser during the late evening, the refusal to permit his brother to attend, and the lengthy interrogation in a small office by two officers out of the presence of his wife. The totality of these circumstances readily supports the conclusion that a reasonable person would believe he was not free to refuse to go to the barracks and submit to questioning. See *State v. Willis*, 145 Vt. at 475, 494 A.2d at 117. The activity described far exceeds the relatively innocuous requests and conduct described in *Mathiason* and *Beheler*. The trial court's conclusion was not erroneous as a matter of law. Accordingly, we affirm.

FOR THE COURT:

/s/ Frederic W. Allen
Chief Justice

VERMONT SUPREME COURT

June Term, 1987

No. 86-468

STATE OF VERMONT

v.

DAVID P. BRUNELL

[Filed Sept. 16, 1988]

On Appeal from District Court of Vermont,
Unit No. 2, Chittenden Circuit

Linda Levitt, J.

Jeffrey L. Amestoy, Atotenry General, and Susan R. Harritt, Assistant Attorney General, Montpelier, for plantiff-appellant.

Kimberly B. Cheney, Robert Sheil, and Ken Messing and Karen Golden, Law Clerks (On the Brief), Montpelier, for defendant-appellee.

Present: Allen, C.J., Peck, Gibson and Dooley, JJ., and Barney, C.J. (Ret.), Specially Assigned.

PECK, J., dissenting. As a brief preliminary statement of my reaction to the majority's decision and opinion in this case, I cannot put it any better than did Justice Holmes dissenting in a 1904 case; he wrote:

> At the present time in this country there is more danger that criminals will escape justice than that they will be subjected to tyranny.[1]

Kepner v. United States, 195 U.S. 100, 134 (1904) (Holmes, J., dissenting; joined by Justices White and McKenna).

I cannot pretend to be blandly dispassionate and removed in the face of the result reached by the trial court and by the majority in this matter, or of the rationale, employed at both levels, in attempting to support it. The majority opinion is socially irresponsible. It is too formulaic and slavishly obeisant before the idol of technicality. I cannot support the decision by concurring in this unfortunate outcome. Accordingly, I must record my dissent and explain my reasons.

We are concerned here with a charge of first degree murder: the slaying of an infant child. The involvement of the defendant-father is not in doubt. He admitted his responsibility to the police, and described graphically his actions which culminated in the death of his small daughter, Abby. There is, of course, no indication at this point of what other evidence of culpable responsibility, if any, may exist; obviously, however, it must be entirely circumstantial at best. Consequently, even if there is enough to take the case to trial, jurors will be left to speculate as to the merits of the charge. They will be forbidden, by judicial fiat, to consider a known and admitted truth-in-fact, even if they are aware of it through the media or otherwise. They must arrive at a verdict of innocence or guilt in the death of a child by acting out a charade of let's-pretend.

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[1] Consider also Jeremy Bentham, Rationale of Judicial Evidence, 6 Works 205: "If rogues did but know all the pains the law has taken for their benefit, honest men would have nothing left they could call their own."

I would not be understood as a champion of egregious actions by the police in the course of a criminal investigation. However, the record is clear that no such conduct occurred here. At all stages of the proceeding the police made a good faith and conscientious effort to comply strictly with the investigative guidelines dictated to them by the courts. A homicide investigation is not a sporting event; it is triggered by an irrevocable *fait accompli*: the extinction of a human life. Today's decision not only ignores, it demeans, the importance of one of the greatest, if not *the* greatest, of all our constitutional rights—the sacred right to life itself.

Chapter I, Article 1 of the Vermont Constitution provides in significant part:

> [A]ll men . . . have certain natural, inherent, and unalienable *rights*, amongst which are the enjoying . . . [of] *life* and liberty . . . and pursuing and obtaining happiness and *safety* . . . . (Emphasis added).

These words are not part of a mere preliminary preamble or policy statement. They are part of an article of the main body of the Constitution itself; its importance is suggested by the fact that it was chosen by the framers of the document to be the very first of its articles.

As a part of the Constitution, it is a part of the fundamental law of this State. As a part of the fundamental law, it is not only subject to, it is entitled to, interpretation, implementation and enforcement by the courts—most particularly by this Court. It is entitled to a *fair* balancing with every other article. This Court particularly has a social responsibility to *all* the people of Vermont; we are accountable to them for the redress provided when the rights of any one of their number, guaranteed by this article, are violated. What price the life

of little Abby Brunell when measured by judicial game-playing?

I.

Evidence and the Reasonable Man

The suppression order, and the affirmance thereof by the majority of this Court, turns primarily on the testimony of defendant's mother during the suppression hearing. The transcript of that hearing discloses that the police first encountered defendant and his wife, at the home of the former's parents in Groton, at approximately 10:05 p.m. on the day of the alleged homicide. Also present were several of defendant's siblings and their spouses. One of the police officers, in his testimony at the hearing, characterized the assemblage as a family gathering.

After the police were admitted to the house, they introduced themselves and explained the purpose of their call as being a part of their investigation into the circumstances surrounding the death of Abby Brunell. They asked defendant and his wife if they would agree to accompany the officers to either one of two state police barracks[2] for interviews in connection with their child's death. Both agreed to go with the officers to the St. Johnsbury barracks.

It was at this point that defendant's mother inquired of the officers if they (defendant and his wife) had to accompany the officers that night or whether the interview could not wait until the following day. The response, according to the mother's testimony, was to the effect that they had to go that night since whatever information the child's parents might provide would still be fresh in their minds. One of the officers testified that,

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[2] At St. Johnsbury, the nearest to Groton, or Middlesex, the nearest to defendant's home in Waterbury, as the Brunells might choose.

at that time, the police had no probable cause for an arrest.

I think it is also appropriate to comment, although there is nothing in the record to address the possibility one way or another, that the officers' hope to interview defendant and his wife promptly, was not only to seek information while it was still fresh in their minds, but so that if either had any motive for doing so, there would be less time to concoct a false alibi or a fictitious account of the circumstances surrounding their daughter's death. In my view, this is good investigatory procedure. The police might well be criticized if they did not investigate a homicide diligently and promptly; presumably it is part of their job to do just that.

My reading of the transcript and the findings indicates that the trial court lifted the brief interchange between the mother and the police out of context. In the finding next preceding those relating to the mother's inquiry, the court said this:

> [One of the officers] told defendant and his wife that they did not have to come to the police station, but if they did come he would bring them back home after the interview at the police station.

The police repeatedly assured defendant, both at his parents' home and later at the barracks, that his presence, and any answers he might choose to give in response to questions, was purely voluntary, that he could terminate the interview at any time he wished, and thereafter would be returned to his home, as in fact he was, regardless of his admissions, and that he was not under arrest. The evidence is uncontradicted that, even *after* the mother's inquiry, defendant himself indicated he understood all of the above; in fact the advice that he was *not* under arrest was repeated to him at the police barracks itself during the interview.

One of several examples of the uncontradicted evidence of defendant's understanding that he was not in custody or under arrest, and that he was free to terminate the interview and leave at any time, is the following excerpt from the suppression hearing transcript. One of the interviewing officers is testifying on direct examination; the questions and answers relate to the preliminary discussion between police and defendant at the police barracks, long *after* the mother's inquiry in Groton, but before defendant admitted his responsibility for Abby's death:

Q. Before you spoke to him, did you tell Mr. Brunell that he was not under arrest and not in custody?

A. Yes, I did.

Q. And did he acknowledge . . . that he understood that?

A. Yes, he did . . . . I further advised him that we would give himself and his wife a ride home at any time that they requested and that they could terminate the questioning at any time. . . .

Q. Did he indicate to you, at that time, that he wanted to go back to [his parents' home in Groton], and he didn't want to talk to you?

A. No. . . . he agreed to go on with the interview.

(After a discussion of events prior to the date of the homicide, the pertinent direct examination continued)

Q. During this stage of the interview . . . did he ask to leave at any time?

A. He never did.

. . . .

Q. Did he indicate to you, in any way that he didn't want to answer your questions?

A. He did not.

(Shortly thereafter, defendant told the officers that his daughter's death was an accident. The officer testified that defendant asked if he was going to jail)

Q. Did you tell him whether or not he would be going to jail?

A. I told him he wasn't going to jail that night. I had promised to take him home.

Defendant and his wife were in fact returned to Groton; no arrest occurred until the next day.

Notwithstanding all of these uncontradicted facts, the cornerstone of the trial court's decision, and of the majority opinion, is the affirmative response of the police to the mother's question whether her son and daughter-in-law had to go with the officers then.

It is clear enough to me that the trial court's interpretation very carefully isolates the officer's response from the context of the surrounding circumstances, trying to justify this approach through a play on the words allegedly employed by the officer in a spontaneous utterance, as though the speaker should know his statement would be literalized and isolated in a vacuum. It seems that law enforcement officers are expected to be thoroughly familiar with all the possible nuances attributable to every word they speak. They will then be so finely honed in their speech abilities that they will be able to respond with the unassailable accuracy of a linguistice pedant under even the most harrowing and unpredictable conditions and circumstances.

In the context of the discussions between the officers and the defendant and his wife preceding the mother's inquiry, which the trial court ignored, it is manifest,

even through the cold printed medium of the transcript, that the officer's response had no more sinister meaning or implications than that, if the couple agreed to accompany the police voluntarily, it should be that night while the circumstances surrounding Abby's death, to the extent of any knowledge they might have, was as fresh in their minds as passing time would permit.

There was no change in the demeanor or attitude of the officers towards Mr. and Mrs. Brunell, no revocation of the request that the couple accompany them voluntarily. There were no objections by the couple, following the brief interchange with defendant's mother, nor was there any withdrawal of their agreement to go voluntarily.

Is it not strange and, one would think, significant that defendant himself did not take the stand and testify that he believed himself to be in custody if that was the fact? Instead, of course, he relied successfully on the weakness of the judicial mentality, at both trial and appellate levels, as being enamored of formula as a substitute for thinking and common sense. In short, and colloquially expressed, that famous and fictitious paragon of legal perfection, the "reasonable man" rides again.

The trial judge here, as well, apparently, as the majority, misinterpreted language employed by this Court in *State v. Willis*, 145 Vt. 459, 494 A.2d 108 (1985); the judge simply failed to examine and analyze the case in its entirety. In that case, we stated (in dicta, since the point being examined did not turn on it, nor enter into the resolution of the issue), and the trial judge here seized on the following:

> [I]n determining when a suspect "has been taken into custody or otherwise deprived of his freedom of action in any significant way," our courts should make an objective inquiry into the totality of the circumstances to determine if a reasonable person

would believe he or she were free to leave or to refuse to answer police questioning.

Id. at 475, 494 A.2d at 117 (citation omitted).

The objective reasonable-man test is designed as a standard for the measure of conduct when it must be judged primarily, if not solely, by the conduct itself, or on conflicting statements by police and a defendant. There are no conflicts here. It should not be applied in circumstances such as this, where the *uncontradicted* evidence demonstrates clearly that, even *after* the mother's question, after the drive to the barracks, indeed after arrival at the barracks and the separation of defendant and his wife, defendant himself acknowledged his understanding, as the officers told him repeatedly, that he was free to terminate questioning at any time, that he was not under arrest, was free to leave at any time, and would then be returned by the police to his own or his parents home, as he desired. Later, he signed a written statement, again acknowledging that his admissions were made voluntarily. Thereafter, the couple were driven back to his parents' home, as he requested—still without arrest. Defendant was not arrested nor his movements restricted in any way until late the following morning, and even then after the arrest had been postponed to allow him time to make funeral arrangements for little Abby.

Finally, as noted above, defendant himself did not take the stand to assert that, in fact he did believe he was in custody, or that he did not actually understand that he was free to terminate questioning or to leave at any time. Such testimony, being in conflict with the evidence given by the police, might at least have been some basis for the reasonable-man test, although deciding credibility of the conflicting testimony is more likely. But that test has no place when the unchallenged and uncontradicted evidence itself answers the question and there

is not the slightest basis to doubt its credibility; *Willis* does not suggest otherwise.

Whatever a hypothetical man might believe, under circumstances where that test is the only fair measure, it is inexcusably applied, and grossly unjust to the right of the people to life, liberty, and safety, when a subject's actual belief is clearly established by uncontradicted evidence as was defendant's in this case. When we consider that a determination of such a nebulous and esoteric issue as subjective intent can be resolved by the trier of fact at a trial on the merits, based on a party's statements, conduct, and other evidence, it is preposterous to interpret *Willis* as holding that a suspect's subjective belief as to his custody status cannot be resolved in the same manner, assuming the evidence exists. By maintaining silence at the suppression hearing, although it was certainly his right to do so, he succeeded nevertheless in luring the trial court, and the majority of this Court as well, into an erroneous resort to the reasonable-man test.

Proof that the *Willis* objective test was not intended to be applied blindly to all cases lies in the very fact that it was not applied even in that case—the very case in which it was announced. The *Willis* trial court had concluded that the defendant had been in custody at a certain critical point in the police investigation. This Court held that conclusion to be error, not by applying the reasonable-man test, but on the basis of the evidentiary facts, including the questioning and other surrounding circumstances. We held that the defendant had not been in custody even though questioned as a suspect. *Willis*, at 476, 494 A.2d at 117-18. In other words, when there are *facts* demonstrating an absence of custody, the speculation and conjecture implicit in the test as applied by the trial court here, and by the majority, are neither necessary nor proper; it is too readily susceptible to the whims and personal leanings of both trial and appellate

judges. The facts here, consisting of the repeated assurances to defendant and his own acknowledgments of his understanding, show overwhelmingly that he was never in custody, nor did he believe himself to be, prior to his formal arrest the following day. The wrong standard was applied by the trial court in granting the motion to suppress; this was error.

The objective reasonable-man test may have a particular significance in the so-called "chase" or "pursuit" cases under the seizure clause of the Fourth Amendment, to which it is more commonly applied. See *Michigan v. Chesternut*, —— U.S. ——, 108 S. Ct. 1975 (1988). It is the only standard available in the great majority of these cases. It is hardly to be expected that someone, trying to elude approaching or following police, will pause in mid-flight to announce his custody/restraint perceptions. Seldom will there be sufficient communications between pursuer and pursued, or other evidence, to support the application of a subjective standard. That is not the case here; moreover, we are concerned in this matter with the privileges against self-incrimination guaranteed by the Fifth Amendment.

One of the inexcusable ironies of the decision mandating the objective test, is its creation of yet another loophole through which wrongdoers will escape the consequences of even the most heinous crimes. Heaping Pelion upon Ossa, today's result ascends to new heights, awarding to criminals a right to *force* the State and the trial courts to apply the reasonable-man standard, regardless of the Supreme Court's characterization of the test as "necessarily imprecise," *id.* at ——, 108 S. Ct. at 1979, even in the face of clear and unchallenged evidence of the subjective fact. The criminal accomplishes this judicially blessed distortion of justice by the simple expedient of keeping his mouth shut at the suppression hearing and figuratively thumbing his nose at the people, his victims, and law enforcement; this Court, in the

meantime, bestows a benevolent and avuncular pat upon his head. To say that this is the meaning of our Constitution is interpretation running wild; it demeans logic and common sense.

II.

Precedent Overruled

Approaching the majority's unfortunate keystone, the mother's testimony, from another perspective, the reliance on that testimony produces a result in conflict with the recent ruling by this Court in *State v. Noble*, 148 Vt. 615, 538 A.2d 162 (1987), which, incidentally, supercedes *Willis* by more than two and a half years.

Noble involved a motion to suppress the results of a breath test and inculpatory statements made by the defendant at the police station in a DUI case. In support of his motion, defendant claimed that the test and statements were the product of an illegal arrest. At the site of the accident which precipitated the police action, the investigating officer administered preliminary dexterity tests to the defendant and concluded that the latter was under the influence of intoxicating liquor. At that point, the officer said to the defendant, "I'm afraid that I'm going to *have* to ask you to come down to the station to take a crimper test" (emphasis added). As in the case before us today, the defendant agreed to go with the officer and did so. The defendant's argument in *Noble* might be considered even stronger that it is here; the officer's statement was made directly to the suspect, not to a third person.

Notwithstanding the mandatory import of the officer's statement to the defendant, this Court said:

> The record . . . fails to disclose any evidence of involuntariness or coercion beyond the coercive elements which may exist " 'simply by virtue of the fact that the police officer is part of a law enforce-

> ment system which may ultimately cause the suspect to be charged with a crime.' "

Id. at 616, 538 A.2d at 163 (citing, of all cases, *State v. Willis*, 145 Vt. at 472, 494 A.2d at 115, and quoting the United States Supreme Court in *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)). Again—and just a year ago—there was no invocation of any reasonable-man test; the question was decided on cold facts as disclosed by the evidence.

Further, in *Willis*, this Court did not wash its hands of responsibility by hiding timorously behind the "discretion" of the trial court as does today's majority. We decided the custody issue in that case *on the record facts* and held that the trial court's finding of custody was error. Considering the age of the *Willis* defendant, a boy in his middle teens, and his lack of any previous experience with the police or the law, it could be argued, with some force, that a reasonable person of his years and lack of sophistication might believe himself in custody, as the trial court had decided.

In this case, the evidence of defendant's understanding was persuasive and totally uncontradicted; it was based entirely on his own acknowledgements, not on any subjective beliefs of the police. It is true that the testimony concerning defendant's admissions came entirely from the investigating officers, but it was accepted by the court; there was no question as to the credibility of the testimony, as the court's findings show. For these reasons, the custody holding was error as a matter of law, to the same extent it was in *Willis*. To the extent it was a discretionary ruling, it was an abuse of discretion.

I do not recognize the applicability of the reasonable-man test under the facts of this case. Nevertheless, even if it is assumed the test is appropriate, the result should not change. Given the repeated assurances given defendant at all stages, no reasonable man could believe he was

in custody, and not free to decline to answer any questions, to terminate the interview and to leave at any time he wished.

I would point out also that in this case, even after the officer's response to the mother's inquiry, neither defendant nor his wife, who had already agreed to go with the police voluntarily, said or did anything to indicate an objection, or that they had changed their minds as to the basis on which they were accompanying the officers; they went willingly. Nor did the refusal of the officers to permit defendant's brother to accompany them change anything. Neither one asked that the brother be allowed to go with them, nor did they protest when the police declined the brother's request.

Once the majority's keystone crumbles, as it does in the light of *Willis*, when carefully analyzed, and of *Noble*, the irrelevance of the factors cited by the majority are revealed for what they are—mere cumulative hype. Let us examine the merits of these factors.

First, defendant and his wife were taken to the State Police Barracks at St. Johnsbury, a time-distance from Groton of approximately half an hour. To read the majority opinion, one would think the two were transported in irons to the west coast. The distance was not excessive by any stretch of the imagination. Be that as it may, both knew where they were going before they started; in fact they were given a choice between the St. Johnsbury or the Middlesex barracks. There is nothing to indicate that their original agreement, to accompany the police voluntarily, changed in any way because of the facilities to which they were to be taken. They went without the slightest protest, with foreknowledge of where they were going. Nor, at any time, was defendant (or his wife) handcuffed or restrained in any way; in fact, they sat alone in the back seat of the vehicle. Cf. *State v. Baldwin*, 140 Vt. 501, 438 A.2d 1135 (1981) in

which the suspect, later the defendant, in a DUI prosecution, was transported *over his protest*, from one town to another for purposes of testing. Regardless of his protest, the trial court, and this Court in affirmance, found that ultimately he went "voluntarily" notwithstanding his known and expressed objection; no reasonable-man test was applied and denial of a motion to suppress was upheld by this Court. *Id.* at 506-507, 513, 438 A.2d at 1138. In this case there was not even an initial protest or objection by defendant to going with the officers.

The second and third factors can be answered on similar grounds. I refer to the facts that defendant's brother was not allowed to accompany them to St. Johnsbury, and that defendant and his wife were interviewed separately. I am inclined to exclaim in amazement: "For heavens sake! The police were not investigating a raid on a cookie jar by a pair of roguish five year olds!" They were investigating one of the most outrageous and brutal crimes known to the criminal code; the defendant has been charged with murder in the first degree of his own infant child. Such an investigation is not a tea party, to which the whole family of a possible suspect must be invited, or allowed to attend, for small talk and petit fours. I submit that it is logical and entirely proper procedure for investigating officers to separate possible suspects and potential witnesses for purposes of preliminary interrogation.

Interviewing separately those who may be involved in a crime, or have some knowledge thereof, may well have the salutory result of unmasking conflicting stories, falsehoods, inaccuracies, bogus alibis and the like. It precludes coaching and interruptions, as well as any quickly interposed response to a question by a person other than the one to whom the inquiry is directed.

The next factor condemned by the majority is its complaint that the interview with defendant lasted an in-

ordinate amount of time. This is simply not true as a practical matter, given the seriousness or the probable crime under investigation. The interview with defendant at the St. Johnsbury barracks began at 10:41 p.m. It reached the point at which the *Miranda* warning was read to him at 12:02 a.m., or a total time of one hour and twenty-one minutes. It is only by an obvious effort to make much out of nothing that this can be characterized as an inordinate or unreasonable period of time. The questioning was polite; it was not threatening or abusive. In fact, the uncontradicted testimony discloses that a fair percentage of the time was devoted to a discussion of occurrences during the two days prior to the child's death and on the final day up to the time of death. Moreover, that discussion uncovered nothing inculpatory to the defendant until he disclosed sufficient knowledge to assert that Abby's death was "an accident." Defendant himself conceded in writing signed by him that he came with the police voluntarily; he acknowledged his understanding that he was not under arrest, and that he could leave at any time; that he had not been subjected to any threats or promises (other than the police "promise[d] that you'd take me home," which was done). His reference to this "promise," which was fulfilled, is a clear recognition that he did not consider himself as in custody or under arrest.

The actual impact on defendant of the factors, relied on by the majority as contributory, is exposed as the phantasm it is by his own acknowledgements after they had occurred.

III.

Recapitulation

The trial court erred in the standard applied to the custody issue. Moreover, the evidence was ovewhelming, particularly in the absence of any denial by defendant of the officers' testimony. Defendant was told repeatedly,

both before and after the mother's inquiry, that he did not have to go, that he was not under arrest, that he could terminate the interview at any time, and would be taken home regardless of anything that happened.

Defendant indicated his understanding of these assurances and acknowledged the voluntariness of his participation, both before and after he was read his *Miranda* rights—which he waived expressly. He was never arrested, i.e., in custody. At one point he even asked specifically if he was under arrest and was told again he was not. He was returned to his parents' home without any restraints whatever placed on his liberty of movement; indeed he might have left the jurisdiction with impunity. He was not in custody and the evidence is unimpeachable that he never believed he was, nor was he given any cause for such a belief.

If there is insufficient evidence to make a factual determination, it may, in a given situation, trigger the reasonable-man test. On the other hand, if, as is the case here, the defendant's understanding can be determined by his own acknowledgements, it is error to rely on the test. The officers' factual testimony was accepted at face value by the trial court and much of it incorporated into the findings: its credibility not questioned.

After what must be hundreds of pages, written over a period of many years, lauding the ability and the right of triers of fact, court or jury as the case may be, to base conclusions on evidentiary facts, the majority suddenly abandons this established and sound principle, and substitute in its place a test, highly speculative at best, and "necessarily imprecise." The majority should be less concerned with carving out a niche for itself in judicial history, and give more attention to logic, common sense, and the concerns of our people in the face of an ever-increasing rate of violent crime against the person. The public expects better from its courts than today's

result. It is little wonder that there is a noticeable diminution of respect for the courts, particularly in criminal matters, and suspicion of the technicalities, wrapped in a cloak of questionable constitutional interpretations, which greatly facilitate the efforts of criminals to escape the deserved consequences of their conduct. Law enforcement authorities are so harrassed by the courts with technicalities and fine lines, that it is a wonder to me they perform as well as they do.

Today's decision frustrates and hampers investigative procedures even more than do the already broad existing requirements. Uncertainty in the investigation of even the most serious crimes has been expanded enormously. The majority has brought us to the point at which it is problematical whether the police will ever dare to interrogate suspects and potential witnesses at police offices because the station-house setting alone will always have some potential for intimidation. The blanket application of the reasonable-man test required by the decision must, almost necessarily, result in suppression in a great majority of cases from minor traffic violations to assaults, child abuse, sex crimes and the most callous and brutal homicides. The likelihood of a suspect being able to "get away with murder," literally, has been enlarged substantially. Thus has the majority responded to its social responsibility.

It seems to me that when an admission of culpability is the result of an investigative interrogation, the rights of the people under Chapter I, Article 1 of the Vermont Constitution should be construed to require suppression only under patently egregious circumstances and the closest scrutiny; applying the reasonable-man test for determining the custody issue only when it is the sole option available. And certainly not in cases where police credibility is not in question, and the defendant himself acknowledges his status.

Finally, I do not understand the United States Supreme Court decisions which discuss it, such as *Chesternut*, to hold that application of the reasonable-man test is constitutionally required even in pursuit cases. This makes the majority's position, mandating the test in *all* cases regardless of the evidence, unnecessary, and all the more incomprehensible considering the inevitable consequences.

The majority have slapped the police in the face by today's decision. and seriously impeded legitimate criminal investigation. It has substituted formula for thinking, and failed in its social responsibility and obligation to the people of the State under the Vermont Constitution. On the strength of overwhelming and uncontradicted evidence, defendant was never in custody as a matter of law. I would remand and direct the trial court to deny suppression in the light of the facts and precedential decisions such as *Willis*, *Noble*, *Baldwin* and others which are implicitly overruled and buried by today's decision.

/s/ Louis P. Peck
LOUIS P. PECK
Associate Justice

STATE OF VERMONT
WASHINGTON COUNTY, SS.

Docket No. 656-6-86 WnCr

STATE OF VERMONT

vs.

DAVID P. BRUNELL

District Court of Vermont
Unit II, Washington Circuit

FINDINGS OF FACT, CONCLUSIONS OF LAW, OPINION AND ORDER

Defendant is charged with first degree murder pursuant to 13 V.S.A. §§ 2301 and 2303. Defendant moved to suppress statements made at an interrogation at the Vermont State Police Barracks in St. Johnsbury during the late evening of June 1, 1986 and the early morning of June 2, 1986. A hearing was held on defendant's motion on September 2, 1986, the undersigned judge presiding. Defendant was represented by his attorneys, Kimberly Cheney and Robert Sheil. State's Attorney Terry Trono appeared for the State. Defendant arrived at the hearing late, but waived any objection concerning his absence from that portion of the hearing which took place prior to his arrival.

At the hearing, the State offered the testimony of Sgt. Ronald A. DeVincenzi, a detective for the Vermont State Police in Middlesex, and Chief Wayne Sourdiff of the

Waterbury Police Department. Defendant offered the testimony of defendant's parents, Lorraine Brunell and Lincoln Brunell.

FINDINGS OF FACT

1. On the morning of June 1, 1986, Sgt. Ronald DeVincenzi of the Vermont State Police received a telephone call from Dr. Paul Morrow of the Chief Medical Examiner's Office for the State of Vermont indicating that a female child by the name of Abby Brunell had been pronounced dead on arrival at the Central Vermont Hospital in Berlin the night before and that a brief examination revealed signs that the child had been physically abused.

2. Sgt. DeVincenzi notified Chief Sourdiff of the Waterbury Police Department, as the alleged victim and her parents resided in Waterbury.

3. On the afternoon of June 1, DeVincenzi and Sourdiff went to the State Morgue in Burlington where they attended the autopsy of Abby Brunell. At the conclusion of the autopsy, Dr. Morrow advised the officers that in his opinion the cause of death was homicide, the manner of death being suffocation and severe shaking of the child.

4. The officers suspected that either the defendant or his wife was responsible for Abby's death since they were aware of prior child abuse allegations made against defendant and his wife. They were also aware that Abby had been removed from the home as a result of the allegations and had only been returned recently to defendant and his wife.

5. The officers went to defendant's home in Waterbury and finding no one home, went to defendant's mother-in-law's residence. There they learned that defendant had gone with his wife to the parents' home in Groton.

6. Before proceeding to the parents' home, the officers met with State's Attorney Terry Trono to discuss the homicide investigation.

7. Mr. Trono and the officers agreed that defendant and his wife were not to be placed in custody during their questioning so that defendant and his wife could be questioned without first being informed of their *Miranda* rights.

8. The Court infers that this tactic was agreed upon because the officers feared that defendant and his wife would not give a statement if they were informed of their *Miranda* rights.

9. Although the officers were aware of the child abuse case involving defendant and his wife, they gave no thought as to whether defendant was represented by an attorney in that case.

10. After the meeting with Trono, DeVincenzi and Sourdiff drove to the Brunell residence in Groton, accompanied by another officer who helped them to locate the house.

11. The three officers encountered defendant at approximately 10:05 p.m. after being admitted into the Brunell home. In addition to defendant's wife and parents, several of defendant's siblings and their spouses were present in the house, having gathered there after learning of defendant's child's death.

12. The officers told defendant and his wife that they were required to investigate their child's death and asked them to go with them to the police station to speak with them about the death. Chief Sourdiff told defendant and his wife that he needed their statements to complete his report.

13. Sgt. DeVincenzi told defendant and his wife that they did not have to come to the police station, but if

they did come he would bring them back home after the interview at the police station.

14. Lorraine Brunell, defendant's mother, at this point asked, "Do they have to go tonight?"

15. Sourdiff replied affirmatively, stating that he wanted the statement that night while events were still fresh in their minds.

16. Defendant's brother then asked permission to accompany defendant to the interrogation. The officers refused this request.

17. Defendant and his wife then agreed to go to the station.

18. Defendant and his wife were taken to the St. Johnsbury Barracks in the police cruiser. The barracks were located about a one-half hour drive from the Brunell home.

19. Upon their arrival at the St. Johnsbury Barracks, the officers immediately isolated defendant from his wife, DeVincenzi and Sourdiff taking defendant alone into a small office while two other officers escorted his wife to a separate location. Defendant had no prior notice that the police intended to question him separately.

20. DeVincenzi and Sourdiff began interrogating defendant at 10:41 p.m. DeVincenzi told defendant that he was not under arrest or in custody, that he did not have to talk and that they would give him a ride home when he wanted.

21. Defendant agreed to be interviewed.

22. At no time did defendant resist the officers' request to question him or in any way indicate an unwillingness to speak with them.

23. Defendant was asked to summarize his activities for the three days prior to his daughter's death.

24. After defendant did so, the officers told defendant that they knew what had actually happened and that the death was not due to meningitis as defendant had indicated. They told him that the autopsy showed that death was caused by suffocation. DeVincenzi asked the defendant, "You wouldn't kill your child intentionally, would you?" The defendant answered "No."

25. Sourdiff then stated that the death was "possibly" accidental and urged the defendant to "let us know now" if it was an acident, as he would "feel a lot better."

26. Defendant replied, "It was an accident," and asked if he was going to jail that night.

27. After DeVincenzi stated that defendant was not going to jail that evening, defendant made additional statements indicating that he had shaken the child and put his hand over her mouth and nose to stop her from crying.

28. DeVincenzi then read defendant his *Miranda* rights. The time was 12:02 a.m. Defendant acknowledged that he understood his rights and signed a written waiver (State's Exhibit 1) at 12:04 a.m.

29. Immediately thereafter, the officers took a taped statement from defendant reiterating his earlier statements. The taped interview concluded at 12:18 a.m.

30. The officers asked defendant additional questions which were not tape recorded. DeVincenzi asked, "When you put your hand over her mouth, what did you think would happen?" Defendant replied, "I thought she would stop breathing."

31. Defendant was unemotional throughout the interrogation and answered questions responsively. At no time did he indicate that he did not want to answer questions or request an attorney. At the start of the taped statement, he acknowledged that his presence at the barracks was voluntary, that he knew he was free

to leave and that he had not been subjected to threats or promises other than the promise that he would be driven home. He was further made aware that criminal charges might be brought against him.

32. At 12:47 a.m., DeVincenzi drove defendant and his wife back to his parents' home in Groton. The defendant was presented with a transcribed statement of his taped statement later that morning, which he signed.

CONCLUSIONS OF LAW

Defendant moves to suppress all statements made during his interrogation at the St. Johnsbury Barracks, asserting that the statements were obtained in violation of his rights under the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution and Chapter I, Article 10 of the Vermont Constitution. He contends, first, that he was in custody during the interrogation, and that because the initial portion of the interrogation was not preceded by *Miranda* warnings, all initial statements must be suppressed. He further contends that the taped statement, taken after police gave the required warnings, must also be suppressed because the warnings were insufficient to "purge the taint" of the initial illegal interrogation. Finally, defendant argues that the statements must be suppressed under *U.S. v. Henry*, 447 U.S. 264 (1980) because at the time of the interrogation, he was represented by counsel in a juvenile proceeding involving the alleged victim in the present prosecution, defendant's daughter.

1. *Denial of Right to Counsel*

The protection against uncounseled statements recognized in *Henry* does not apply where police question an unindicted suspect regarding incidents unrelated to those that form the basis for an existing prosecution. *See Hoffa v. U.S.*, 385 U.S. 293 (1966) (Where defendant's statements concerning unindicted offense were unrelated

in time and subject matter to Government's possible intrusion on his Sixth Amendment rights in a separate prosecution, suppression was not required in later trial on the unrelated incidents). Of course, the Fifth Amendment requires that a confession be suppressed if it is given after a suspect's request for counsel is ignored, *Miranda v. Arizona*, 384 U.S. 436 (1966), but defendant here makes no such claim. The Sixth Amendment right to counsel attaches only to "critical stages" of a criminal proceeding. *Gilbert v. California*, 388 U.S. 236 (1967). Because defendant had not been formally charged in connection with his daughter's death at the time of the interrogation on June 1 and 2, no Sixth Amendment rights with respect to the present prosecution had attached, and the Court will not suppress his statements on that basis.

2. *Failure to Give Miranda Warnings*

Although the Court rejects defendant's Sixth Amendment claim, it agrees with his other two contentions and concludes that all statements obtained from him at the St. Johnsbury Barracks must be suppressed. The critical issue raised by defendant's motion is whether defendant was in custody during the interrogation within the meaning of *Miranda v. Arizona*, 384 U.S. 436 (1966). If he was, *Miranda*'s procedural protections apply and any statements obtained without the required warnings must be suppressed. *Id.*

The test for determining whether a suspect is in custody was most recently articulated by the Vermont Supreme Court in *State v. Willis*, 145 Vt. 459 (1985). The Court stated:

> [I]n determining whether a suspect 'has been taken into custody or is otherwise deprived of his freedom of action in any significant way,' *Miranda*, *supra*, 384 U.S. at 444, our courts should make an objective inquiry into the totality of the circumstances to determine if a reasonable person would believe he or

> she were free to leave or to refuse to answer police questioning.

Id. at 475. Under the *Willis* test, neither the officers' intent nor defendant's subjective perception of his predicament are relevant to the Court's determination. *Ibid.*

Applying the *Willis* standard to the instant case, it is clear that defendant was in custody throughout the interrogation at the St. Johnsbury Barracks on June 1 and 2. Although the evidence shows that Sgt. DeVincenzi and Chief Sourdiff told defendant several times that evening that he was not under arrest, did not have to answer questions and could get a ride home at any time, it also shows that at critical moments through the evening, the officers' statements and conduct conveyed a contradictory message. A careful examination of all the evidence compels the conclusion that defendant was "deprived of his freedom of action in [a] significant way," *Miranda*, 384 U.S. at 444, and therefore should have received the required warnings before the interrogation commenced.

The officers first confronted defendant at around 10:00 p.m. at his parents' home in Groton, where numerous family members had gathered after learning of defendant's daughter's death. After the officers asked defendant to accompany them to the State Police Barracks in St. Johnsbury, defendant's mother asked, in defendant's presence, whether defendant and his wife "had" to go that night. Sourdiff replied in the affirmative, stating that he "needed" defendant's statement to complete his report and wanted to get it while events were still fresh in defendant's mind.

Sourdiff's reply to the inquiry whether defendant "had" to go, coupled with the time and location of the interrogation and defendant's progressive isolation from family and familiar surroundings, convince the Court that a reasonable person in defendant's shoes would not

have felt free to leave or to refuse to submit to questioning. *See State v. Willis*, 145 Vt. at 475. While not controlling, the location of questioning is a significant factor in determining the existence of custody. *Cummings v. State*, 341 A.2d 294 (Md. App. 1975). Questioning in the police-dominated atmosphere of the station house is a significant indication of custody. *Ibid; Miranda*, 384 U.S. 436 (1966). In circumstances similar to those present here, courts have determined that custody existed. *See, e.g., Fisher v. Scafati*, 314 F. Supp. 929 (D. Mass. 1970, *aff'd*, 439 F.2d 307 (1st Cir. 1971) (custody found where defendant confronted alone in a small room at police headquarters by three officers).

No less significant is defendant's isolation from family members. Deliberate removal of a suspect from the presence of family and friends supports a finding of custody. *Cummings v. State*, 341 A.2d 294 (Md. App. 1975); *Commonwealth v. Sites*, 235 A.2d 387 (Pa. 1967) (custody existed where police escorted defendant from his father-in-law's home, where several people were present, to his own home for questioning). Here, not only did the officers refuse to permit defendant's brother to accompany them, but upon arrival at the barracks, abruptly isolated defendant from his wife and took him alone into a small private office for questioning. This is precisely the "incommunicado interrogation . . . in a police dominated atmosphere" that the Vermont Supreme Court condemned in *Willis*, 145 Vt. at 475, and which the U.S. Supreme Court prohibited over twenty years ago in *Miranda v. Arizona*, 384 U.S. at 445.

An additional factor bearing significantly on the existence of custody is whether the interview is conducted during normal business hours or at an odd hour. *Cummings*, 341 A.2d at 302; *Orozco v. Texas*, 394 U.S. 324 (1969). Here, the officers represented to defendant that they were investigating his daughter's death as part of a routine required procedure. However, their arrival at

defendant's parents' home after 10:00 p.m. and insistence that statements be taken that night indicated that the investigation was anything but routine, adding further to the suggestion of custody.

In sum, although the officers in this case attempted to convey the impression that defendant was not in custody during the late evening of June 1 and the early morning of June 2, the Court's examination of the totality of the circumstances compels the conclusion that he was, thus entitling him to *Miranda*'s procedural protections from the time the interrogation commenced. Because the interrogation was not preceded by the required warnings, all statements made during the initial portion of questioning must be suppressed. *Id.*

3. Post-Miranda Statements

The only remaining issue is whether the *Miranda* warnings given in the brief interim between the initial interrogation and the taking of the taped statement sufficed to "purge the taint" of the initial illegality, and thus would permit admission of the taped statement and other statements not recorded. Exclusion of the fruits of a *Miranda*-tainted statement is not necessary or required in all instances. *See Oregon v. Elstad*, 470 U.S. ——, 36 CrL 3167 (1985). In *Oregon v. Elstad*, the U.S. Supreme Court's most recent pronouncement on this subject, the Court held that the mere fact that a suspect makes an initial unwarned admission does not warrant a presumption of compulsion as to subsequent, warned statements. *Id.* at 3171. The Court stated that "[a] subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement." *Ibid.* However, the Court explicitly eschewed any *per se* rule, suggesting that lower courts must continue to "examine the surrounding circumstances and the course of police conduct

with respect to the suspect in evaluating the voluntariness of his statements." *Id.* at 3172.

Here the Court is not satisfied that the taint of the unwarned statement was dissipated by the giving of warnings. Defendant was subjected to close and intense late-night interrogation at the station house which became increasingly accusatory. During the questioning, the officers confronted defendant with the autopsy report on Abby Brunell, telling him that his version of events did not coincide with the autopsy results. In a matter of minutes after obtaining the first incriminating statement by illegal means, the officers used that statement to extract a second one, pausing only to administer the *Miranda* warnings. There was no break in the stream of events between the first statement and the second one which would have insulated the latter from the effects of what came before.

In circumstances similar in several respects to those present in the instant case, the Vermont Supreme Court held in *State v. Badger*, 141 Vt. 430 (1982), that a warned statement was properly excluded as involuntary where the statement was preceded by an initial illegal interrogation. The *Badger* Court recognized that proximity in time and circumstances between two confessions "minimizes the salutary effects of the *Miranda* warnings." *Id.* at 441. Here, the time lapse—several minutes—is even more powerful evidence of a tainted connection than in *Badger*, where the warnings were given fifteen hours after the first statement in a separate interrogation. *Ibid.* The *Badger* Court also noted the ineffectiveness of warnings in purging the taint where police use the illegally-obtained statement to extract a second one. *Ibid.*

The Court concludes that in the circumstances present in this case, warnings were insufficient to enable defendant to exercise the "free will" and "rational and intelli-

gent choice whether to waive or invoke his rights" that *Elstad* and other precedent require. *Elstad*, 36 CrL at 3170-71. For this reason, defendant's taped statement, in addition to the initial unrecorded statement, must be suppressed.

ORDER

Accordingly, defendant's motion to suppress statements made during the interrogation on June 1 and 2, 1986 is hereby *GRANTED*.

Dated at Burlington, Vermont this 29 day of September, 1986.

/s/ Linda Levitt
LINDA LEVITT
District Judge

STATE OF VERMONT
WASHINGTON COUNTY, SS.

Docket No. 656-6-86Wncr

STATE OF VERMONT

v.

DAVID BRUNELLE

MOTION TO SUPPRESS

taken on Tuesday, September 2, 1986

Before:

HONORABLE LINDA LEVITT
Presiding Judge

Appearances:

TERRY J. TRONO
Washintgon County State's Attorney

KIMBERLY B. CHENEY
Attorney for the Defendant

* * * *

QUESTIONING OF VERMONT STATE POLICE SERGEANT DeVINCENZI

[5] Q. Could you tell the Court how you became involved?

A. On the morning of June 1, 1986, I received a telephone call from the Assistant Chief Medical Examiner, Dr. Paul Morrow, who advised me that a child had died at the Central Vermont Hospital the previous evening and that the Regional Medical Examiner, Dr. Beldin, had given him a call and advised him of the facts of the death.

Q. Approximately what time did you first learn of this matter?

A. Approximately 10:00 a.m.

Q. And did you personally speak with Dr. Morrow?

A. Yes.

Q. And what did Dr. Morrow tell you at that time, other than just that he had a young child there who had died?

A. He advised me that the child's name was Abby Brunelle; that she was approximately eighteen months old; and that she had been a previous victim of child abuse and had, in fact, been out of the home for a considerable time. He also advised me that it was apparent that this death was probably child-abuse related and that postmortem examination was scheduled for that morning and that he [6] wanted to initiate a police investigation.

Q. So, he essentially told you that his first preliminary reaction, after seeing the child, was that it was death by child abuse?

A. He thought there was possibility that there was no known cause of death.

Q. Did he tell you the child was in SRS care?

A. I believe he did.

Q. What did you do after receiving Dr. Morrow's call?

A. I believe the first thing I did was notify my supervisor and I subsequently notified Chief Sourdiff, as the death occurred within his jurisdiction.

Q. And that would be Waterbury; right?

A. Yes.

Q. And did you eventually meet with Chief Sourdiff?

A. Yes.

Q. Did you and Chief Sourdiff attend the autopsy on that Sunday?

A. Yes.

Q. And approximately what time, Sergeant, did you go to Burlington for that autopsy?

A. I would have to refer to my report to get the exact time, but we arrived at the morgue in Burlington [7] sometime around 1:30 in the afternoon.

Q. And did Dr. Morrow confirm his earlier remarks to you that the cause of death was an apparent homicide of child abuse?

A. Subsequently that was determined, closer to the completion of the autopsy.

Q. After leaving the autopsy, what did you and Chief Sourdiff do?

A. I'm sorry. I didn't hear you.

Q. After leaving the autopsy, what did you and Chief Sourdiff do?

A. Proceeded back to the Waterbury Police Department to meet with other investigators at that time.

Q. When you got back to the Waterbury Police Department, were you aware of who might potentially be responsible for the death of the child?

A. Would have been just suspicion at that point.

Q. What did you decide to do at that point?

A. To interview the parents of the child.

Q. How were you able to locate them?

A. With great difficulty. We went to the parents' residence on Stowe Street and no one was present there.

We next went to the child's mother's parents' residence in Waterbury Center and were advised at that time that the victim's parents were at his parents' residence in Groton. [8] And we subsequently drove to Groton, met with another State Police investigator—who is a neighbor of the victim's grandparents—and were subsequently introduced to the victim's parents.

Q. Before arriving in Groton to meet with Mr. and Mrs. Brunelle, what information, or what facts, did you have as to their involvement, if any?

A. Really, very little. We knew that the victim had been taken from the home and was, at the time of the death, in SRS custody. We knew that the victim had very recently been returned to the parents and that although the parents were caring for the victim, the victim was still, technically, in SRS custody.

Q. Before you spoke to Mr. and Mrs. Brunelle, did you know who had access to the child here or during the time of death?

A. I don't believe so.

Q. What time—you may have answered this—but what time did you make contact with David Brunelle at the Groton residence?

A. I would have to refer to my report to be specific, but I would guess that it was sometime around 9:30.

Q. Could you refer to your report for the exact time? [9] A. My report indicates that at 10:05 p.m., we departed from the Lincoln Brunelle residence and proceeded to St. Johnsbury. So, contact would have been made shortly prior to 10:05 p.m.

Q. Where did you first see David Brunelle on that day, which would be June 1, 1986?

A. Um—As I entered his parents' residence from the doorway, coming from the driveway; it's the first room just inside the doorway. I think it's a living room.

Q. And this is the Lincoln Brunelle residence?

A. Yes.

Q. Could you describe when you got there, who was present?

A. There were several people, both inside and outside of the residence. I don't know exactly how many; but as I understand it, the people were his family: brothers, and I'm not sure, possibly sisters. And his parents were there. But there were people outside of the residence as we pulled up, maybe five or six people. And there were people also inside of the residence, too, sitting around there. I believe Mr. Brunelle was seated in a chair just to the right of the doorway as we came through.

Q. Who was with you when you went to the residence, Sergeant?

A. Detective Sergeant Wayne Dyer and Chief [10] Sourdiff came to the residence with me.

Q. Were you in uniform?

A. No.

Q. And how were you dressed, sir?

A. Casual clothes.

Q. Was Chief Sourdiff in uniform?

A. No. He was in civilian clothes as well.

Q. And you mentioned that another state policeman, Dyer, assisted you in finding the residence?

A. Yes.

Q. Sergeant Wayne Dyer was in uniform?

A. No. He was in street clothes.

Q. How did it come about that you involved Wayne Dyer in this?

A. We didn't know where the Lincoln Brunelle residence was and I knew that Dyer lived in Groton. And as it turned out, they were next-door neighbors. He lived very close to the Brunelles and was familiar with the residence.

Q. Prior to your arrival, did Wayne Dyer tell you that—you know—to the family?

A. I believe that he did. He told me, too—you know —they were neighbors.

Q. And you arrived at the residence at approximately 10:00 at night?

[11] A. Yes.

Q. Who entered the residence, as far as police officers?

A. Dyer, Sourdiff, and myself.

Q. Why don't you tell the Court what happened once you arrived; who let you in, who greeted you, and so on?

A. Well, we took two cars to the residence. Dyer took his own car and Sourdiff and myself were in my car. We pulled into the yard; we got out; walked toward the house. Sergeant Dyer greeted people that were standing about. It was apparent that he knew them, and we were admitted into the residence. And upon entering the residence, like I said, Mr. Lincoln Brunelle was seated in a chair just inside of the doorway. Dyer immediately introduced myself and Sourdiff to Mr. Lincoln Brunelle; and, at that time, I believe I expressed condolences for his granddaughter and asked to speak with David and his wife.

Q. Were you and Chief Sourdiff introduced as police officers.

A. Yes.

Q. And where was David Brunelle?

A. He was standing right there. David was standing right there along with several other people, and he was introduced to us, and his wife was introduced to us. [12] And at that time, I believe I expressed condolences for the child to them, and I advised them that we were investigating their daughter's death and that we wished to speak with them.

Q. Did you feel at that time, when you walked into the Brunelle residence, that you had probable cause to arrest David Brunelle?

A. Definitely not.

Q. Did you feel that you had probable cause to arrest anyone in that residence?

A. Definitely not.

Q. Why don't you continue with your conversation of David Brunelle.

A. David and his wife were standing right there along with all of the other people. And upon advising him that we were investigating the death, I told him that we needed to speak with them. And I asked them if they would be willing to accompany us to the state police barracks, and I assured them that they would be returned to the residence as fast as we could get there, take their statements, and get home.

Q. Did you make those remarks to just David Brunelle?

A. The whole crowd was standing there; I'm sure everybody heard us.

[13] Q. Did you tell Mr. Brunelle he was not under arrest?

MR. CHENEY: I'm going to object.

THE COURT: Overruled.

A. At that time, I told the Brunelles that they didn't have to come with us; but that we wanted to clear the matter up, and because they were the victim's parents, and because David and his wife were the last ones to be with the victim. And we simply left it up to them whether or not they wanted to accompany us.

Q. And what did they say?

A. They both agreed and they had very little to say about it. They didn't ask questions or anything like that.

Q. Did you tell them where you'd like to interview them before you left?

A. It is my recollection that I asked them to come to the St. Johnsbury State Police barracks with us, and I may have also offered to take them to the Middlesex barracks, with the option of them staying in the house at Waterbury that night because it is a considerable half-hour drive either way. And it seems to me that they wanted to stay in Groton that night; so, St. Johnsbury barracks was agreeable.

Q. I may have asked this, Sergeant, but did you [14] tell them that you wanted to talk to them about the subject matter which concerned the death of their daughter?

A. Oh, definitely.

Q. Did either Mr. Brunelle or Mrs. Brunelle say, in any kind of way, that they didn't want to go with you?

A. No, they did not.

Q. Did they ask that you talk to them at the Lincoln Brunelle residence?

A. I don't recall asking them.

Q. Where did you go?

A. To the St. Johnsbury State Police barracks.

Q. And how did the Brunelles get there?

A. They rode with Chief Sourdiff and myself in my car.

Q. And do you recall where they sat in your car?

A. In the back seat.

Q. Together?

A. Yes.

Q. Approximately what time did you arrive at the St. Johnsbury barracks?

A. Sometime around 10:30 p.m.

Q. Was it set up in advance as to who was going to speak with you, as far as Mr. and Mrs. Brunelle?

A. No, it was not.

Q. How did that happen?

[15] A. Once we got to the St. Johnsbury barracks, Sourdiff and myself went inside with Sergeant Jean Lessard and Lieutenant George Strong, and we briefly talked. And it was then decided that Strong and Lessard would interview Mrs. Brunelle and that the Chief and myself would interview David. And they were subsequently taken straight to offices and interviewed at the same time.

Q. Where in the barracks did you and Chief Sourdiff talk to David Brunelle?

A. In Captain Adams' office.

Q. Who else was present in the room when you spoke to David Brunelle?

A. Just the Chief and myself.

Q. Do you have the specific time, Sergeant, that you began to speak to David Brunelle at the barracks in St. Johnsbury?

A. Yes, I do.

Q. And what would that be?

A. It would have been at 10:41 p.m. on June 1, and I'll add that we arrived at the barracks at 10:31 p.m.

Q. Excuse me, and then began to speak to him at 10:41?

A. 10:41, right.

Q. Before you spoke to him, did you tell Mr. Brunelle that he was not under arrest and not in custody?

[16] A. Yes, I did.

Q. And did he acknowledge that in some way, that he understood that?

A. Yes, he did.

Q. Did you also tell him that he was free to leave if he wanted to do that?

MR. CHENEY: Your Honor, I really think at this point, I would like to hear from the Sergeant instead of Mr. Trono.

THE COURT: Sustained.

Q. (By Mr. Trono) Why don't you tell us what you told David Brunelle before you started to talk to him about the death of his daughter?

A. David was told that he was free not to talk to us and that he was free to leave at any time. And I further advised him that we would give himself and his wife a ride home at any time that they requested and that they could terminate the questioning at anytime. He was also advised that he was not under arrest.

Q. After you told him that, did he respond in any way?

A. I believe I would have asked him if he understood it.

Q. Did he indicate to you, at that time, that he wanted to go back to the Lincoln Brunelle residence, and [17] he didn't want to talk to you?

A. No. At that time, he agreed to go on with the interview.

Q. How did the interview proceed?

A. I think I began by asking David what led up to his daughter's death. And he went on to tell me about his daughter having gotten a rash on her face a few days before and so forth. And we led into him telling us about the most recent acts of his life. I asked him, basically, what he did on Thursday, what he did on Friday, and what he did on Saturday, prior to the death. And he went on to give me a summary of daily activities. And what I was trying to determine, at that time, was pretty much who was with the victim at the time prior to death. I was trying to pretty much pin down who was or who would have been responsible, and who was with her and so forth. And he pretty much went on telling me how when the victim was brought to the hospital, some female doctor told him that the victim had meningitis and so forth.

Q. To summarize at this point, you were basically asking him to go over the last two or three days of what the child was like and what he was doing?

A. Yes.

Q. During this stage of the interview with David Brunelle, did he ask to leave at any time?

[18] A. He never did.

Q. Did he ask to talk with his wife or lawyer or some other person during this stage of the interview?

A. He did not.

Q. Did he indicate to you, in any way, that he didn't want to answer your questions?

A. He did not.

Q. At some point, Sergeant, you discussed with him the autopsy results?

A. Yes.

Q. How did that come about?

A. After him telling me about the past approximately three days of his daughter's life, at one point I looked at him and said, "Look, I attended the autopsy today, and myself and others know what happened to your daughter." And I told him that the death was not due to the meningitis; that that was not possible. And I told him that she had been—the daughter—had been sufficated. And then I started to get into the autopsy results; and at one point, we stated to David Brunelle that the victim's death was possibly accidental and that it was possibly an accident, which was a possibility in my mind at that point. And we went from his initial statements to the autopsy results; and at one point, he advised us that it was an accident.

* * * *

QUESTIONING OF POLICE CHIEF SOURDIFF

[80] Q. Chief, when you went to the Lincoln Brunelle residence in Groton, had you ever been there before?

A. No, sir.

Q. And who did you know at that point?

A. Lincoln and his wife and a brother, Jimmy.

Q. So, you knew three of them, Lincoln, Lorraine, and Jimmy?

A. Yes, I did.

Q. And how well did you know Lincoln?

A. Well, when Lincoln was in Waterbury; we knew each other.

Q. Had there been any criminal complaints concerning the Brunelles at all?

A. I don't recall.

Q. So, it was a social acquaintence?

A. We knew each other.

Q. Now, as you went in the door, you struck up a conversation with Lincoln?

A. Yes.

Q. And then DeVincenzi turned to David and Ann and explained what he was doing?

A. I believe that's true.

Q. Okay. Now, did you or DeVincenzi, either one of you, tell David and Ann that in cases of a sudden death [81] of a child, it was required that there be an investigation?

A. I believe so.

Q. So you told them, in substance, that it was a required investigation that you were making?

A. We told them we needed their statement.

Q. And you needed it because it was required for your investigation?

A. I would assume that's right.

Q. So, as far as they were concerned, and what was told to them, was that they were required to give you a statement as part of this investigation that you were making?

A. They were never told that they were required to. We asked them to make a statement on what had happened. We didn't tell them that it was required.

Q. You told them that you had to make a decision; didn't you?

A. I told them that I had to have some sort of statement from them in order to make up my report.

Q. And so, he needed to give you a statement in order for you to make a decision in your report?

A. I asked him to give a statement.

Q. In your deposition you said on page 11, "We have to make a decision somewhere here. We have to know something about it."

[82] A. That's true. That's what I said.

Q. Is that right?

A. That's right.

Q. So, as far as David and Ann were concerned, or as far as David was concerned, he was told by you or DeVincenzi that you had to have a statement?

A. Doesn't mean he had to give us one.

Q. But that's what you told him anyway?

A. We tell that to everybody, that we are going to take a statement from them.

Q. Now, this is about 10:00 o'clock at night?

A. Yes.

Q. And the family is there?

A. Yes.

Q. Did they appear to be, as Sergeant DeVincenzi said, grieving over the loss of their child?

A. Didn't look that way to me.

Q. In any event, the whole family was gathered around?

A. They were there. There was no crying or anything, so I didn't feel they were grieving too much.

Q. All right. Didn't Lorraine Brunelle, whom you know, turn to the two of you, DeVincenzi and yourself, and say, "Do they have to go tonight"? Do you recall her saying that?

[83] A. That's possible that she said something like that?

Q. And your answer was, "Yes. Yes, we've got to do it tonight while its fresh in their minds"?

A. No. I believe my answer was, "I'd like to have it tonight."

Q. Because it's fresh in their minds?

A. That's right; but I didn't tell them, "while it's fresh in their minds."

Q. I'm sorry. Which is it?

A. No. I told them I would like to have it that night.

Q. All right. And, therefore, they were to go with you to St. Johnsbury?

A. They were asked to go with us to St. Johnsbury.

Q. Now, did you participate in the discussions as to whether or not a Miranda Warning should be given?

A. Yes.

Q. And the decision was made that you wouldn't give the Miranda Warning if you didn't have to?

A. We didn't know who we were going to give them to. Immediately, we had no suspects or anything at the time when the decision was made or discussed.

* * * *

This is a statement taken at 0005 hours on 06 02 86 at the St. Johnsbury State Police Barracks. Statement is being taken by Detective Ronald Devincenzi and Chief Wayne Sourdiff. This is the statement of David P Brunell and Miranda has been read acknowledged and waived.

Q: OK David we've been talking here for a while now, this is about an incident involving your daughter Abby and I just before we get going I just want to make sure you understand your Miranda Rights?

A: Yes I do.

Q: OK you also understand that your coming here tonight is voluntary?

A: Yes.

Q: And that you are free to leave at anytime including now?

A: Yes.

Q: OK and you understand that when we get done here um you're going home?

A: Yes.

Q: Having your rights in mind do you want to go forth with your statement?

A: Yes I do.

Q: OK last night sometime around 11:00 your daughter Abby was picked up by the Waterbury Ambulance in Waterbury and taken up to Central VT Hospital where she was pronounced dead and we've been talking here for a little bit and you said you had something you wanted to get off your chest. Why don't you just tell me in your own words what happened yesterday at your house in Waterbury?

A: Well all of a sudden she started crying.

Q: Were you alone at home with her?

A: Yes I was, I was alone.

Q: And where was Ann?

A: She went out with her sister, nightcrawlering.

Q: Uh huh the baby was crying?

A: The baby was crying and I went into see what was the matter and I shook her then she wouldn't stop crying and then I just put my hand over her mouth and she stopped.

Q: When you shook her how did you do that?

A: Well she was lying on her back and I just shook her in her bed.

Q: Did you put both hands on her?

A: Yah I did.

Q: Like where were they, show me on Wayne?

A: Just on her side like that.

Q: OK like on her arm and back?

A: Yah.

Q: You shook her pretty good?

A: Yah.

Q: And then you put your hand over her mouth and. . .

A: Yah.

Q: Kind of like blocking the mouth and nose?

A: Yes.

Q: How long did you have your hand there for?

A: Uh a few minutes not to long.

Q: OK did she stop breathing when you did that?

A: Yes she did.

Q: OK and um did you notice anything about her, was the light on in the room?

A: No it wasn't, it was dark.

Q: Uh huh, OK could you hear her stop breathing or?

A: No.

Q: You just noticed that she wasn't breathing?

A: Right.

Q: What did you do after that?

A: Just got paranoid, didn't know what to do, I ran out of the house left to go and call the ambulance.

Q. When you went out of the house did you take her with you or?

A: I took her I got her coat on and wrapped a couple of blankets around her and took her out to see if we could find Ann, my wife, found her, then we went down to the police station and nobody was there and we just called an ambulance from the minimart.

Q: OK when she first stopped breathing did you just watch her for a while?

A: Yah I did.

Q: For about how long?

A: Couple of minutes, not very long.

Q: When I talked to you a little while ago you said maybe about 20 minutes you sat in the bed?

A: Yah about twenty to yah twenty minutes.

Q: Is that correct or no?

A: Yah, it didn't seem that long to me, I'd say no more than fifteen minutes.

Q: What were you doing during that time?

A: Just sitting on the bed, thinking.

Q: (Wayne) What were you thinking about, David?

A: What happened, how was I going to tell somebody or . . .

Q: (Wayne) What were you afraid of?

A: Going to jail.

Q: (Wayne) for what?

A: Murder, it was an accident, I didn't mean it.

Q: OK do you drink at all?

A: Once in a while, not often.

Q: Were you drinking last night?

A: No.

Q: How about drugs do you use any drugs?

A: I quit five years ago drugs, just wasn't into it.

Q: You're being honest with me right?

A: Yah, honest.

Q: OK um when you went down to get your wife did you tell her what happened?

A: No I didn't, I didn't tell nobody until now, I told her she stopped breathing, but I left it at that.

Q: Wayne and myself are the first people you're telling?

A: Yes.

Q: Did your wife believe you?

A: Yes.

Q: Back going back to about a year ago when SRS took her took her away back at that time um I'm not real familiar with what happened but they said she'd been abused?

A: She's been abused some but I didn't do that.

Q: Do you know who did?

A: All the evidence pointed at this guy that was over at our house that night, um he was upstairs all the time we were down stairs.

Q: Who was that?

A: Clayton Wheeler of Montpelier.

Q: Is he your friend or relative?

A: No he was a friend of my brothers and he was over that night and we were drinking but not that heavily.

Q: So getting back to last night when you put your hand over her mouth did she bite at all?

A: Nope.

Q: No. Can I see your hands?

A: There dirty.

Q: OK did you do anything else other than shake her and put your hand over her mouth?

A: No that's all I did.

Q: Um she had some awful bumps on her head?

A: Um a couple of them like she's got a mattress on the floor like in the corner and it's got the big mop boards on it, and she does have nightmares and it's got a fancy design on it um she usually does have nightmares and stuff . . .

Q: Well these are pretty good bumps like somebody dropped her, did that happen at all?

A: No I didn't pick her up only to get clothes on her and take her out.

Q: (Wayne) You didn't pick her up when you held your hand over her mouth and dropped her on the mattress or anything like that?

A: That's cruel.

Q: (Wayne) Well no but sometimes . . .

A: Oh yah I know what you mean.

Q: How long had she been crying last night before you shook her?

A: Oh a couple of minutes 15 minutes, it was steady crying.

Q: Any idea why she was crying?

A: No.

Q: Was she like hungry or?

A: Nope she ate some but not all of it.

Q: What did she eat last night?

A: She ate a couple of hotdogs and some mashed potatoe.

Q: And uh what time would that have been?

A: It was earlier about 5 or 5:30.

Q: Last night when you went up to the mini mart it was some time around 10:30?

Q: (Wayne) It was between 10:30 and 11:00 I believe, would you say was I correct by me saying that?

A: Yah.

Q: And this incident happened what ½ hour or so before then?

A: Yah.

Q: Would that be right?

A: Yah.

Q: And this was in your apartment?

A: Yes it is.

Q: (Wayne) How many rooms in your apartment?

A: Just the living room kitchen and bedroom and bathroom.

Q: (Wayne) In other words the baby sleeps in the bedroom with you?

A: Yah.

Q: And what did you think would happen when you got to the hospital last night were you scared?

A: Yah I was pretty well scared.

Q: Did you think you'd get caught?

A: Eventually after a while yah.

Q: (Wayne) So what did you think tonight when we showed up and went to the house?

A: I was really scared.

Q: (Wayne) So did you think you'd been caught?

A: Yah.

Q: What are you going to do about telling your wife? Do you want to tell her? or Do you want us to tell her or what?

A: I want to tell her I think it would be best if I did, I know I've got to face up to it now?

Q: Um do you want to tell here here or . . .

A: I'll wait until I get home.

Q: Are you sure?

A: Yah.

Q: What if she doesn't want to stay there?

A: Home?

Q: Yah.

A: I'll have to take her home then.

Q: (Wayne) Were you bothered by the baby crying?

A: Well it's just that it was steady.

Q: (Wayne) But it only was for a couple of minutes, has it ever bothered you before? has she ever cried that long before?

A: Nope not that long she cried but like I said pick her up or pat her back.

Q: (Wayne) You understand a couple of minutes isn't very long?

A: Yah.

Q: (Wayne) I don't want to put words in your mouth but I'd like to have a true estimate of time here if you can remember correctly?

A: I'd say about 10 minutes something like that.

Q: (Wayne) Ten minutes of constant crying?

A: Five minutes or ten minutes . . .

Q: Was the TV on were you watching TV at the time?

A: Nope I was listening to the stereo.

Q: (Wayne) Did that make you mad that you couldn't hear the stereo?

A: It did a little bit.

Q: (Wayne) Alright was there a special song on you wanted to listen to or something?

A: No I was just sitting all by myself I like to listen to the stereo.

Q: (Wayne) Were you mad because you were staying all by yourself, cause your wife had gone out and left you babysitting?

A: I don't mind.

Q: (Wayne) But it made you mad because you couldn't listen to the stereo, somewhat mad?

A: Somewhat.

Q: David is there anything else you want to tell us, now you've come this far?

A: No.

Q: Wayne do you have anything else?

Q: (Wayne) Nope just that when we went to see you and asked you to come with us that you were not under arrest and that you were here voluntarily and you understood that and that you could leave at any time, when we started talking here?

A: Yah.

Q: Have we made you any threats or promises?

A: You ain't made me no threats but you said you'd promise that you'd take me home.

Q: (Wayne) We told you when we picked you up that you were not under arrest that you were going to go home?

A: Right.

Q: Other than that though there is no . . .

A: No threats no promises.

Q: We didn't promise you that anything was or wasn't going to happen or anything like that?

A: No.

Q: OK do you have any questions or anything on your mind?

A: Nope I guess that's it for now.

Q: You understand that now we have to talk to the Medical Examiner and the States Attorney and we'll just see what happens?

Q: (Wayne) And you do realize that you might have to go to court over this and that's why we're doing all this. A court hearing.

A: Yah I understand that.

Q: (Wayne) You understood that?

A: Yah.

Q: David that's all I have the time is 0018.

I swear that the above statement is true and factual to the best of my knowledge. I am voluntarily signing this statement. I have read the same and have had the same read to me at 0958 hours on 06-02-86 by Sgt. DeVincenzi. No threats or promises have been made to me regarding this case.

/s/ David Brunell

/s/ [Illegible]
Notary Public at Middlesex
6-2-86

/s/ Wayne Sourdiff
6-2-86

ORIGINAL

Supreme Court, U.S.
FILED
DEC 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

88-821

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF VERMONT,
PETITIONER

v.

DAVID BRUNELL,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VERMONT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is a murder suspect in custody when police tell him he's not under arrest, but that he "had to" leave his family that night at 10:00 PM to go with police to a station a half hour drive away and give a required statement?

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STATEMENT OF THE CASE

Abby Brunell, the infant daughter of David and Ann Brunell, died on May 31, 1986 in Waterbury, Vermont. Ann had gone out leaving Abby alone with David. On her return she met David holding the lifeless body of Abby who was rushed to the hospital by ambulance. A June 1 autopsy led to the medical examiner's opinion that Abby's death was a homicide by child abuse. The patterns of injury suggested that the mechanisms of injury and death included shaking and manual asphyxiation. See Exhibit A. The medical examiner called State Police Sgt. DiVincenzi with this information, who in turn called Waterbury Police Chief Wayne Sourdiff to coordinate an investigation. Sourdiff knew that Abby was in the custody of her parents at the time of her death. He also knew that Abby had been the prior victim of child abuse and had been taken from parental custody for protection sometime in the past.

DiVincenzi and Sourdiff met with the State's Attorney. A plan evolved to attempt an interview with the Brunells without giving Miranda[1] rights. The police learned David and Ann were in Groton, Vermont (approximately 45 miles from Waterbury) at the home of David's parents. So the police went to Groton in an effort to get statements.

They arrived at the elder Brunell's house at approximately 10:00 PM where several of Defendant's siblings and their spouses were present, having gathered there after learning of Abby's death.

DiVincenzi and Sourdiff walked into the family gathering. After extending condolences, DiVincenzi told David and Ann they were investigating Abby's death. David was face to face with DiVincenzi who told him he "needed to get some information". (Tr. p. 12).[2] He said he was required to make

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[1] Miranda v. Arizona, 384 U.S. 436 (1966)

[2] Transcript references are to the transcript of the suppression hearing.

a report about Abby's death and wanted a statement from David. Tr. p. 50.

DiVincenzi told David he was not under arrest, and asked him to come to the police station to give a statement. A discussion took place as to which police station they would go to--Middlesex (the station covering Waterbury) or St. Johnsbury--which was closer. David asked if he would be coming back. DiVincenzi then promised he would bring him back to his parents' house that night without arresting him.

At this point Sourdiff became involved. He told David and Ann he "needed to get their statements because it was required by his investigation". (Tr. p. 31). They were told by Sourdiff "I have to have some sort of statement from them in order to make up my report". Mrs. Lincoln Brunell became involved. She testified (Tr. p. 97-98) that David's state of mind was confused. "It was like he was lost". Then the following occurred:

> Q. (by Mr. Cheney) When the police came into your house, do you recall any conversation? Do you remember what they said to David?
>
> A. Well, I don't know which one it was, but they asked him if--they told him they wanted him to go to St. Johnsbury for questioning, and I asked them if they had to go tonight because they was pretty upset at losing his daughter; and he said, "yes, he had to go tonight", that he couldn't put it off, or something like that...
>
> Q. Did you raise any objection at this time?
>
> A. I just asked them if they had to go cause they were pretty upset at losing his daughter and I asked, "do they have to go?" "Couldn't it wait?" and they said, "no, they had to go tonight".
>
> Q. It was clear to you that they had to go that night?
>
> A. Yes.
>
> Q. Did they give a reason?
>
> A. They just said for questioning.

Sgt. DiVincenzi, who was in charge of the investigation, claimed not to remember the conversation, but did not deny it occurred. Tr. p. 51). Sourdiff remembered it saying "that's possible that she said something like that". (Tr. p. 83).At

that point David and Ann "agreed" to go to the St. Johnsbury State Police Barracks to give the requested statements.

David and Ann went on the half hour trip to the police station in a police vehicle (which was their only way home). David was separated from Ann and interrogated from about 10:30 PM to 12:15 AM, without initially being given his Miranda rights. Eventually he gave a confession that he had shaken and suffocated Abby. He was alone with police the entire time. Eventually the police did take Ann and David home.

On cross-examination DiVincenzi summed up the entire sequence of events, from the initial meeting in Groton until he returned the Brunells there, admitting:

> "It is a fair inference that this individual (David) believed that if he answered questions and confessed, that he would not be arrested and he would be taken home". Tr. p. 68.

After the suppression hearing, the trial court held that a reasonable person in David's position would not believe that he was free to refuse to go to the barracks and answer police questioning that evening. The Court suppressed the confession, a decision upheld by the Vermont Supreme Court.

I. REASONS WHY THE WRIT SHOULD BE DENIED

The Vermont trial court and Supreme Court, applied the correct standard in evaluating whether Brunell was in custody for Miranda purposes. That standard was announced in State v. Willis, 145 Vt. 459, 475; 494 A.2d 108, 117 (1985) following Berkemer v. McCarty, 468 U.S. 420, 442 (1984):

> "In determining when a suspect 'has been taken into custody, or otherwise deprived of his freedom of action in any significant way', our courts should make an objective inquiry into the totality of the circumstances to determine if a reasonable person would believe he or she were free to leave or refuse to answer police questioning."

The Vermont Supreme Court analyzed this case, as it did Willis, in the light of this Court's decisions in Oregon v. Mathiason, 429 U.S. 492 (1977) and California v. Beheler, 463 U.S. 1121 (1983). In both those cases, this Court enunciated the Miranda custody test, as whether the suspect is under arrest or its functional equivalent. That is the test that the Vermont Supreme Court applied.

The "custody" or "functional equivalent of arrest" test developed in Mathiason and Beheler for Fifth Amendment purposes and applied by the Vermont courts is not a bright line test. Necessarily courts must sift through a rich diversity of fact patterns to weigh the totality of circumstances on a case by case basis to determine what an objective person would conclude. This much is recognized by Justice Peck, dissenting, by his reference to Michigan v. Chesternut, U.S. 108 S.Ct. 1975 (1988). Accordingly, administering this aspect of Miranda must be left to the careful scrutiny of judges who apply the correct legal standards, and some leeway must be given them in exercising this responsibility.

The totality of circumstances here support the Vermont court's determination that a reasonable person in David Brunell's position would believe he had been arrested, or the functional equivalent of it:

1) DiVincenzi told him he "needed" to give a required statement, although he didn't have to come with him, and wasn't under arrest;

2) Later Sourdiff told David's mother, David "had to go" that night to give a statement, apparently confusing David and contradicting DiVincenzi (so characterized by Chief Justice Allen). (Petition pg. 8a);

3) David and Ann were taken from an isolated rural area in a police cruiser for a half hour ride and so had no independent means to leave;

4) There is a negative implication in DiVincenzi's statements, as he admitted on cross, that if David didn't come and give the statement he would be arrested;

5) David was taken late at night to a police station and isolated from family and friends to be interrogated;

6) A person in David's position would believe he was under arrest. Since he was alone with Abby at the time of her death, he was aware that the investigation had focused on him and he was subject to arrest. David

stated in his confession that he was scared when the police showed up at the house because he thought he had been caught. Pet. p. 58a. C.f. United States v. Bengivenga, 845 F.2d 593, N.16 (5th Cir. 1988).

The State's brief in support of the Petition insists that the Vermont Supreme Court's decision is erroneous because it turns "on one officer's answer to a question from respondent's mother that he had to go to the police barracks". (Pet. p. 6). Of course, a reading of Chief Justice Allen's opinion demonstrates his judgment rests on far more than that. In addition to the facts previously recited, the Vermont courts undoubtedly realized the incommunicado interrogation in the police station is precisely the arena in which Miranda is designed to function. In contrast, the atmosphere in a motor vehicle stop "is substantially less police dominated than that surrounding the kinds of interrogation at issue in Miranda itself." Berkemer v. McCarty, 488 U.S. 420 (1984).

What the Assistant Attorney General really complains of is that the Vermont courts did not accept her contention that the "had to go" statement was an insignificant inducement on the Defendant. Surely, however, Chief Justice Allen is correct in stating that all the police "activity described far exceeds the relatively innocuous requests and conduct described in Mathiason and Beheler". (Pet. p. 8a)

This Court requires a neutral judge insist that the state meet a "heavy burden" to demonstrate that the Defendant knowingly and intelligently waived his Fifth Amendment privilege. Miranda, 384 U.S. 475. It is consistent with that duty to conclude that telling a suspect he "had to go" is coercive, and vitiates the purported voluntariness of the trip to the police station and the subsequent confession. The Vermont judges fulfilled their legal obligation by concluding that David's removal to the police station and the subsequent lengthy incommunicado interrogation, were the functional equivalent of

custody, notwithstanding the police ruse of a promise of nonimmediate arrest in exchange for a confession.

The State asserts there is confusion and lack of uniformity among the federal circuits, and the state courts concerning the proper test for custody for Miranda purposes. Even if true, that situation should not affect this case.

Simply put, Mathiason and Beheler clearly delineate the standard to apply to Fifth Amendment confession issues when Miranda is implicated. The Vermont courts applied that standard. If Miranda is to be administered with any efficiency, decisions which reasonably apply the correct legal test to a relevant fact pattern should not be disturbed. The Vermont courts committed no error.

For the foregoing reasons, the writ should be denied.

Dated: Dec 30, 1988

DAVID BRUNELL

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CERTIFICATE OF SERVICE

On this day of December, 1988, I mailed the above-entitled Respondent's Brief in Opposition to Susan R. Harritt of the Vermont Attorney General's Office, Pavilion Office Building, Montpelier, Vermont.

Kimberly B. Cheney
Kimberly B. Cheney